1992

Superior Soft Water Company v. Utah State Tax Commission : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SUPERIOR SOFT WATER COMPANY, Petitioner/Appellant, vs. UTAH STATE TAX COMMISSION, Respondent/Appellee.	)	Case No. 920337-CA

BRIEF OF RESPONDENT

PETITION FOR REVIEW

OF THE FINAL DECISION

OF THE UTAH STATE TAX COMMISSION

ARGUMENT PRIORITY CLASSIFICATION 15

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JURISDICTION

This case involves review of a final decision of the Utah State Tax Commission. The Supreme Court has appellate jurisdiction over final orders and decrees in formal adjudicative proceedings originating with the State Tax Commission pursuant to Utah Code Ann. § 78-2-2(3)(ii) (1992). The Supreme Court transferred this case to the Court of Appeals pursuant to 1992 Utah Laws 127, § 11 (to be codified at Utah Code Ann. § 78-2-2(4)). The Court of Appeals now has jurisdiction of this case pursuant to 1992 Utah Laws 127, § 12 (to be codified at Utah Code Ann. § 78-2a-3(2)(k)).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

The standard of review for agency decisions on proceedings initiated prior to January 1, 1988, is determined by case law prior to the adoption of the Utah Administrative Procedures Act. Morton Int'l, Inc. v. State Tax Comm'n, 814 P.2d 581, 583-4 (Utah 1992). This prior case law applied three basic standards of review set forth in Utah Department of Administrative Services v. Public Service Commission, 658 P.2d 601 (Utah 1983). These three standards are to be applied depending on whether the agency decision is based on a question of fact or law.

First, agency decisions of basic fact are to be given great weight and only overturned if they are not supported by any evidence of substance whatsoever. Administrative Services, 658 P.2d at 609. Second, agency decisions of general law are to be reviewed giving no deference to the agency's decision, but reviewing it for correctness. *Id.* at 608. Finally, agency decisions involving mixed questions of law and fact or the application of specific factual situations to the legislative enactments under which the agency operates are to be reviewed giving some deference to the agency's decision and upheld so long as they fall within the bounds of reasonableness and rationality. *Id.* at 610.

I. The first issue in this case is whether the sale of Superior's water softeners after installation and use of that water softener pursuant to a lease agreement is subject to Utah sales tax.

Standard of Review. This is a mixed question of law and fact and should be reviewed giving some deference to the Tax Commission's decision because it involves application of the Tax Commission's expertise in the interpretation of the statutes which it is empowered to administer.

II. The second issue is whether the Tax Commission violated the Administrative Rulemaking Act in assessing sales tax on the

sale of water softeners sold after a lease arrangement.

Standard of Review. This is a question of statutory interpretation and should be reviewed giving no particular deference to the Tax Commission's decision.

III. The third issue is whether Superior should be relieved from paying the sales tax assessed because Superior misinterpreted the tax laws.

Standard of Review. This question should be reviewed giving some deference to the Tax Commission's decision because it involves application of the Tax Commission's expertise in the interpretation of the statutes which the Tax Commission is empowered to administer.

IV. The fourth issue is whether Superior's due process claim is barred from review because Superior failed to raise the issue before the Tax Commission. Additionally, if Superior's due process argument is barred then Superior's claim for attorney fees under 42 U.S.C.A. 1988 should also be denied. If the Court allows this issue to be entertained, then the issue is whether Superior's due process rights have been violated.

Standard of Review. This is a question of constitutional interpretation and should be reviewed giving no deference to the Tax Commission's decision.

DETERMINATIVE STATUTES AND RULES

All determinative statutes, rules and constitutional provisions include the following and are set forth verbatim in Appendix A attached hereto:

Utah Code Ann. § 59-12-103 (1987)

Utah Code Ann. § 59-15-4 (Supp. 1986)

Utah Code Ann. § 59-16-3 (Supp. 1986)

Utah Admin. Rule 865-19-51S (1986)

Utah Admin. Rule R865-19-58S (1986)

Utah Admin. Rule R865-19-78S (1986)

Utah Code Ann. § 63-46a-1 to -15 (1986)

Utah Code Ann. § 63-46a-3 to -4 (1987)

Utah Constitution, Article 1, section 7

United States Constitution, Fourteenth Amendment

42 U.S.C.A. § 1983 (1979)

42 U.S.C.A. § 1988 (1981)

STATEMENT OF THE CASE

This case results from a sales and use tax audit for the audit period 1/1/85-12/30/86, conducted by the Auditing Division of the Utah State Tax Commission (hereinafter "Tax Commission" or "Respondent"), of Superior Softwater (hereinafter "Superior" or "Petitioner"). The Auditing Division assessed Superior for,

among other items, sales tax it should have collected on the selling price of water softeners that it first leased on a monthly basis to a customer and then sold to that same customer. That final selling price has been referred to as the residual sales price because it is the price of the water softener minus the monthly lease payments. R. 95. It is the tax treatment of this type of sale that has remained as the only issue throughout the lengthy history of this case that is relevant to the present appeal. The course of the proceedings is lengthy and is set out specifically in the Statement of Facts below. The Tax Commission held in its final decision on this matter that sales tax must be collected on the residual sales price of a water softner that has been first leased and then sold.

STATEMENT OF FACTS

1. Petitioner is in the business of manufacturing, renting, and selling water softeners. Petitioner has operated Superior Soft Water in its present venture since February 1985. R. 19.

2. This case results from a sales and use tax audit of Petitioner conducted by the Auditing Division of the Utah State Tax Commission. The audit period at issue is January 1, 1985 through December 31, 1986. The amount at issue is $11,855.97

plus interest accruing daily at $3.59. R. 19-20.

3. Superior was in business from 1956-1971 and started up again in 1985. T. 19-20. Mr. Gerald Lambourne of Superior testified that Superior was audited by the Auditing Division in 1959 or 1960 and at that point claims it was collecting and remitting sales tax on all its transactions, including those leases that were later converted to sales. T. 48. He claimed that no sales tax deficiency was assessed. R. 6.

4. Superior claims it was later told by a competitor that water softeners were to be considered real property and should not be taxed and so Superior requested a meeting with the Tax Commission where it was told not to collect sales tax on water softeners that it sold because they were considered to be real property. T. 53-54; R. 6. However, although Superior met with the Tax Commission, the appropriate method of determining sales tax on leases which were converted to sales was not discussed. R. 6.

5. As a result of the tax assessment resulting from the audit conducted for the period 1/1/85-12/31/86, Petitioner filed a Petition for Redetermination and an informal hearing was held on January 6, 1988, David Angerhofer, Hearing Officer, presiding. R.117.

6. The Tax Commission issued its Informal Decision on May 5, 1988 upholding the tax assessment. R.119. The findings of the informal decision stated in pertinent part:

> Water softeners which are first leased to a customer and then sold to that customer are subject to tax on the monthly rental payment for the duration of the lease, and are subject to sales and use tax on the residual sales price of the later sale of the water softener to that customer. Separate transactions will have occurred. There is no double taxation.

R. 118.

7. A request for clarification of the Tax Commission's Informal Decision regarding the tax liability of Superior's water softeners was submitted on September 16, 1988 by Brian C. McGavin, C.P.A., on behalf of Superior Soft Water. R. 113. This was answered in writing by James E. Harward, Tax Commission Hearing Officer, on January 18, 1989. R.112.

8. A request for clarification of James E. Harward's clarification was filed by Gerald Lambourne on behalf of Superior Soft Water some time after January 18, 1989. This was again answered in writing by James Harward, Hearing Officer, on April 26, 1989. R. 111.

9. Because Superior continued to claim that the Tax Commission's position was confusing, the Auditing Division filed a Motion for Reconsideration and Clarification of the Informal Decision dated May 5, 1988, on September 22, 1989. R. 94-110.

(See the Auditing Division's Motion at R. 94-110 for a more thorough discussion of the conflict of interpretation.)

10. The Tax Commission held a clarification hearing on February 6, 1991. R. 48. Briefs by both the Auditing Division and Superior were submitted and are a part of this record. R. 55-71; R. 72-85.

11. The Tax Commission issued its Order from the clarification hearing on February 27, 1991, which held the purchases of water softener by customers either during or upon the completion of a lease as being sales by Superior. R. 48-54.

12. Petitioner filed its Petition for Formal Hearing on March 29, 1991. The sole issue was the tax consequence to a water softener that was first leased and then sold. R. 44.

13. The Tax Commission held a Formal Hearing on October 29, 1991. R. 4. Testimony was taken and the transcript of this hearing is part of the record. Briefs were submitted also and are part of the record at R. 11-18; R. 23-34.

14. The Tax Commission issued its Final Decision on February 6, 1992 (erroneously dated February 6, 1991 on the Decision). In its Conclusions of Law, the Commission stated:

> Tangible personal property which is attached to real property, but remains personal property, is subject to sales tax on the retail selling price of the personal property, and installation charges are exempt if separately stated. (Utah Admin. Rule R865-19-51S(E))

R. 7. This Final Decision affirmed both the previous Informal Decision and the subsequent Order. R. 8-9. The Decision and Order of the Final Decision states in pertinent part:

> Based upon the facts as presented at all stages of these proceedings, the Tax Commission finds that the leases of water softeners which were converted to sales are subject to sales and use tax on the residual sales price of the later sale of the water softener. For example, if the sale is for $950.00 less three lease payments of $12.95 each, or a total of $38.85, then sales tax must be collected on the residual purchase price of $911.15. This, of course, assumes that sales tax would have already been collected on the $38.85 of lease payments. The Commission thus affirms the Informal Decision of May 5, 1988 and the Order of February 27, 1991.
>
> The Commission is not persuaded by any argument of the Petitioner that it had relied upon past representations made by former Tax Commissioners or Commission employees, when it claimed it met with those individuals in approximately 1962 to ascertain the appropriate tax treatment which should be given to these types of transactions. As testified to by Petitioner's witness, the taxable treatment which should be accorded to leases which are subsequently converted to sales was not discussed with any of those individuals. Therefore, the Petitioner could not have relied upon such advice to his detriment.

R.8-9.

15. Petitioner filed its Petition for Writ of Review of the Tax Commission's Final Decision on March 9, 1992, in the Supreme Court of Utah. R.1.

16. Petitioner filed its Docketing Statement on March 30, 1992, in the Supreme Court of Utah.

17. The Supreme Court of Utah assigned this case to the Utah Court of Appeals and notified the parties by letter dated June 1, 1992.

SUMMARY OF ARGUMENTS

Petitioner should have collected sales tax on the residual price of water softeners sold after they have been installed and used pursuant to a lease agreement. The sale of a water softener after such a lease arrangement is the sale of tangible personal property which is attached to real property and is subject to sales tax pursuant to Utah Code Ann. § 59-12-103(1)(a) (1987) and Utah Admin. Rule 865-19-51S (1986). The sale price is not exempt from tax as installation charges because Petitioner has not proved that the sale price represents solely such installation charges, and because Petitioner failed to separately state such charges pursuant to Utah Admin. Rule 865-19-51S(E) (1986).

Respondent has not violated the Utah Administrative Rulemaking Act (hereinafter "UARA") because Respondent relied on established statutes and rules in assessing Petitioner's sale of water softeners. Pursuant to Utah Code Ann. § 63-46a-3 (1986), rulemaking is not required when a procedure or standard is already described in statute. Since the sales tax standard is already described by statute, Petitioner is on notice of the tax

requirements, and no rule is required. Furthermore, Respondent has not "changed" its policy on the taxing of water softeners, but has merely applied the relevant taxing statutes to the situation at hand.

Petitioner should not be relieved of its tax liability for its own misinterpretation of the law. Mistake of law is no defense for failure to pay taxes.

Petitioner's due process claim is not properly before this Court since Petitioner failed to raise such an issue before the Tax Commission. Issues not raised by the parties at the fact finding level cannot be considered for the first time on appeal. Petitioner is therefore barred from raising such a claim. If this Court finds that Petitioner may raise such a due process claim, the Court should find the Tax Commission has not violated Petitioner's due process rights because the taxing statutes are sufficiently clear as to what conduct is required.

Finally, Petitioner should be denied an award of attorney fees pursuant to 42 U.S.C.A. § 1988 in this case because Petitioner failed to raise a claim under 42 U.S.C.A. § 1983 before the Tax Commission, and is therefore barred from raising such a claim for the first time on appeal.

ARGUMENT

I. THE SALE OF SUPERIOR'S WATER SOFTENERS AFTER INSTALLATION AND USE OF THOSE WATER SOFTENERS PURSUANT TO A LEASE AGREEMENT IS SUBJECT TO UTAH SALES TAX.

The Tax Commission and Superior agree on the sales tax applicable to an outright sale of a water softener pursuant to an installation contract. When Petitioner sells a water softener and installs it pursuant to a sales contract, the sale is not subject to sales tax because it is considered a sale of real property not tangible personal property. Instead of requiring the purchaser to pay sales tax on the purchase, the manufacturer/seller is required to pay tax on the materials used to make the water softener. This taxing scheme is explained by Utah Admin. Rule R865-19-58S (1986) which provides: "The person who converts the personal property into real property is the consumer of the personal property since he is the last one to own it as personal property." Additionally, in this outright sale scenario, the charges for labor to install the water softeners are not subject to sales tax so long as they are separately stated. Utah Admin. Rule R865-19-78S (1986).

Respondent and Petitioner also agree on the tax applicable to the leasing of a water softener. When Petitioner leases a water softener, the lease payments are subject to use tax

pursuant to Utah Code Ann. § 59-12-103(1)(k) (1987).[1]

The Tax Commission and Superior disagree on the sales tax applicable to the sale of a water softener after that water softener has been installed and used pursuant to a lease contract. It is the Tax Commission's position that the sale of a water softener after it has been leased to the customer is subject to sales tax pursuant to R865-19-51S on the residual price of the water softener. Rule R865-19-51S(E) provides that tangible personal property which is attached to real property, but remains tangible personal property, is subject to sales tax on the retail selling price of the tangible personal property. When Superior installs the water softener pursuant to a lease contract, the water softener remains tangible personal property subject to use tax. Any sale of the water softener after a lease arrangement is thus a sale of "tangible personal property which is attached to real property, but remains tangible personal property," and is a sale subject to sales tax. Thus, if a water

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[1] Citation to the 1987 version of § 59-12-103 is made throughout this Brief because this is the statute that has been referred to in previous proceedings and in Petitioner's Brief. However, the law in effect at the time of the assessment period is controlling, and therefore, the correct cite should refer to Utah Code Ann. §§ 59-15-4(1)(a) and 59-16-3(1)(c) (Supp. 1986). The 1986 and 1987 versions of the statute are substantively the same, so for simplicity we have continued to cite the statute previously used. The 1986 version is set forth verbatim in Appendix A attached hereto.

softener is installed in a home and then leased for six months and thereafter the customer decides to buy it outright, the residual price of the water softener--that is the total sale price minus the lease payments--is subject to sales tax just as the former lease payments were.

Superior's contention that the sale of the water softener after a lease arrangement is not subject to sales tax because the residual sale price solely represents installation charges which are exempt from tax should be rejected for two reasons.

First, Superior has offered no evidence that the residual cost between a water softener that is first leased and then sold is solely the cost of labor to install the water softener which is already installed as a rental item. In fact, Mr. Lambourne testified at the Formal Hearing on October 29, 1991, that the direct labor cost to install a water softener was between $110.00 and $125.00, depending on the home's plumbing. T. 40. In Petitioner's Brief to the Tax Commission dated January 31, 1991, it was noted that the sale price of a water softener is around $950.00, and the vendor's cost of materials amounts to $170.00. R. 80. Thus, it costs Petitioner $170.00 in materials and $110.00 to $125.00 in labor to install the water softener. This leaves some $655.00 to $670.00 in unaccounted, mark-up cost.

Second, even if Petitioner could prove to the satisfaction of this Court that the difference in cost between a rented water softener that remains a rental and one that is later sold is the cost of the installation charges, Petitioner must still pay tax on those charges in this instance because it has not complied with R865-19-51S, which states in pertinent part:

> E. Tangible personal property which is attached to real property, but remains personal property, is subject to sales tax on the retail selling price of the personal property, and installation charges are exempt if separately stated. If the retailer does not segregate the selling price and installation charges, the sales tax applies to the entire sales price, including installation charges.

Utah Admin. Rule R865-19-51S(E) (1986) (emphasis added). Since Superior did not segregate out the installation charges for its water softeners from the entire sales price of the water softeners when it sells them after a leasing period, the sales tax applies to the entire sales price, including installation charges. A taxpayer may not later claim, as Superior attempts to do here, that the entire product price outside of material is tax-exempt installation costs unless these installation charges were separately stated. To allow this would be to grant an unauthorized tax exemption on a portion of the sales price of the product.

II. THE TAX COMMISSION DID NOT VIOLATE THE UTAH ADMINISTRATIVE RULEMAKING ACT IN ASSESSING SALES TAX ON THE SALE OF WATER SOFTENERS SOLD AFTER A LEASE ARRANGEMENT.

The Tax Commission has relied on established statutes and rules in assessing sales tax on Superior's sales of water softeners sold after use of the softeners by purchasers pursuant to a lease agreement. The Tax Commission has not adopted a new rule for such tax treatment nor has it made a change in policy for such tax treatment, and therefore, it has not violated the rulemaking requirements of the Utah Administrative Rulemaking Act (hereinafter "UARA"). Utah Code Ann. §§ 63-46a-1 to -15 (1986).

A. The Tax Commission has not violated the UARA because no rulemaking is necessary in this case.

Under the 1986 version of the UARA, subsection 3 provides:

> (3) Rulemaking is required when:
>
> (a) agency actions affect a class of persons;
> (b) agency actions affect the operations of another agency; or
> (c) statutory or federal mandate requires rules.

Utah Code Ann. § 63-46a-3 (1986).[2] Under this version of the

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[2] Petitioner cites the 1987 version of the Utah Administrative Rulemaking Act in its Brief submitted to this Court. However, the law in effect at the time of the assessment period is controlling, and therefore, the 1986 version of the Utah Administrative Rulemaking Act is controlling. A comparison of the two versions reveals that the 1986 version is more lenient and favors Respondent's position that no rulemaking is required in this case. Both versions of this Act are attached hereto in Appendix A.

Rulemaking Act, Respondent is not required to follow rulemaking procedures because Respondent's assessment does not affect a class of persons or the operations of another agency, nor is Respondent required by statute or federal mandate to make a rule in this case.

Additionally, the UARA provides at subsection 4:

> (4) Rulemaking is not required when:
>
> > (a) a procedure or standard is already described in statute;
> > (b) agency action affects an individual person, not a class of persons; . . . .

Utah Code Ann. § 63-46a-4 (1986).

Pursuant to this statute, no rulemaking is required in this case because the taxing of the transaction at issue is already described by statute. The law the Tax Commission relies on here is Utah Code Ann. § 59-12-103. Section 59-12-103 provides:

> (1) There is levied a tax on the purchaser for the amount paid or charged for the following:
>
> > (a) retail sales of tangible personal property made within the state;
> >
> > . . . .
> >
> > (k) leases and rentals of tangible personal property if the property situs is in this state, if the lessee took possession in this state, or if the property is stored, used, or otherwise consumed in this state; . . . .

Utah Code Ann. § 59-12-103(1) (1987).

In this case there are two separate transactions and each is governed by the above statute. The first transaction involves the lease of tangible personal property when Petitioner leases a water softener to a customer. It is undisputed that this transaction is subject to use tax pursuant to § 59-12-103(1)(k). The second transaction involves the sale of tangible personal property when Petitioner sells the water softener to the customer who had been leasing the water softener. This transaction is subject to sales tax pursuant to § 59-12-103(1)(a). Since the water softener is installed pursuant to the lease agreement, it remains tangible personal property at the time of the sale. It is undisputed that § 59-12-103 is applicable in this case, and Respondent's interpretation of this statute is straightforward and does not involve the adoption of a new rule.

Furthermore, no rulemaking is required in this case because Petitioner has not shown that the ruling of the Tax Commission has affected anyone other than itself. No evidence has been presented to show that other water softener companies similarly rent and then sell a water softener and might therefore be affected. Thus, under § 63-46a-4(b), no rulemaking is required because the "agency action affects an individual person, not a class of persons."

B. The Tax Commission has not violated the notice requirement of the UARA because the standard is already set forth by a statute that gives notice.

Petitioner argues that a rule should have been adopted setting forth the proposition that water softeners first rented and then sold are subject to sales tax on the residual price so that Petitioner would be on notice of the tax requirement. However, since the sales tax standard is already provided by statute, Petitioner is imputed with knowledge and notice of the tax requirements. The Tax Commission does not provide a rule for every different situation in which the application of the taxing statutes arises, nor can it be expected to do so. Such a requirement would dictate a rule for almost every taxpayer and would, therefore, be unwieldy and impossibly burdensome.

C. The Tax Commission has not violated the UARA because there was never a change in policy by the Tax Commission.

Superior further contends that the Tax Commission has improperly "changed" its policy on taxing water softeners. Respondent has not changed its policy on the taxing of water softeners, but has merely applied the relevant taxing statutes to the situation at hand. When the taxing of water softeners was previously discussed between Petitioner and the Tax Commission, the subject matter of that conversation was limited to the sales tax on outright sales of water softeners pursuant to installation

contracts. T. 28, 44. The taxation at issue today is the sales tax on sales of water softeners after a leasing arrangement and Superior has offered no evidence that it ever, whether during its first business venture during 1956-1971 or again in 1985, inquired about the tax consequence to the residual price of a water softener after it had been leased first. R. 6; T. 44. Applying a different statute or rule to a different transaction is not a "change" in policy. Respondent's position has remained the same: outright sales of water softeners pursuant to installation contracts are not subject to sales tax; sales of water softeners after installation and use of the water softeners pursuant to a lease agreement are subject to sales tax.

While Respondent should not play "hide-the-ball" with its tax interpretation policies, it cannot read the mind of every taxpayer posing questions to the Commission and explain to the taxpayer every tax aspect of the taxpayer's business. Once again this would be too cumbersome a duty to place on the Tax Commission. It is up to the taxpayer to find out how each different transaction in his business is taxed and Superior has testified in this case that it did not do so. T. 44.

Petitioner cites Williams v. Public Service Comm'n of Utah, 720 P.2d 773 (Utah 1986), for the proposition that the Tax Commission has violated the rulemaking act because of its

"change" in policy regarding the taxing of water softeners. Williams, however, can be distinguished and can be used to support Respondent's position that there has been no "change" in policy in this case.

In Williams, the Utah Supreme Court held that the Public Service Commission (hereinafter "PSC") engaged in improper rulemaking when it ruled, through adjudication, that it would deregulate the one-way telephone paging market. Williams, 720 P.2d at 777. The PSC had regulated this market for over twenty years and the adjudication thereby changed a long standing practice which affected a number of companies to which it had previously issued regulatory certificates. The Court found that this "change in clear law" required formal rulemaking procedures. *Id.* at 776.

In the present case, there is no evidence of any "change in clear law." As noted above, Petitioner argues that Respondent has "changed" its policy over the years in regards to water softeners that are first rented and then sold. However, Petitioner has admitted at the hearing that although its representative talked with Tax Commission representatives regarding its tax liability when it resumed business in 1985, it never actually asked about the specific tax treatment of water softeners that are first leased and then sold. Had Petitioner

asked the proper question it could have been made aware of Respondent's interpretation of this situation and the Tax Commission's position on this matter. Since it never asked a question regarding leased water softeners that are thereafter sold, and was therefore never given information on that specific transaction, Petitioner has not shown that a clear change in law, as discussed in the Williams case, has taken place.

III. RELIEF FROM A MISINTERPRETATION OF THE TAX COMMISSION'S INFORMAL AGENCY DECISION SHOULD NOT PROVIDE RELIEF FROM A MISINTERPRETATION OF THE LAW.

The Tax Commission issued an informal decision on this matter on May 5, 1988, affirming the assessment for taxes for the audit period in question. That decision noted:

> Water softeners which are first leased to a customer and then sold to that customer are subject to tax on the monthly rental payments for the duration of the lease, and are subject to sales and use tax on the residual sales price of the later sale of the water softener to that customer. Separate transactions will have occurred. There is no double taxation.
>
> . . . .
>
> Water softeners which are first leased and then sold to a customer become part of the realty at the time of sale.

R. 118-119. On February 27, 1991, Respondent issued an Order clarifying this initial Informal Decision and stating that it was meant to uphold completely the assessment of the Auditing Division which was that sales tax should be collected on the

residual price of the softener at the time of the later sale. Respondent noted that Petitioner may have in good faith misinterpreted the Informal Decision dated May 5, 1988, and therefore relieved Petitioner from paying the taxes it had not collected between May 5, 1988 and March 1, 1991 as a result of its misinterpretation of that decision. R. 48-54.

Petitioner now contends that it misinterpreted in good faith the taxing statutes so Petitioner should also be relieved from paying the taxes it did not collect between January 1, 1985 through December 31, 1986 as a result of its misinterpretation of the law. However, ignorance and mistake of law is no defense for failure to pay taxes, nor is misinterpretation, even if made in good faith. Rosseberg v. Holesapple, 260 P.2d 563 (Utah 1953) (In a usurious loan case, the court noted, "[i]gnorance of the law excuses no one, not even an honest money lender.").

In Walker Center Corp. v. State Tax Comm'n, 437 P.2d 888, (Utah 1968), the Petitioner urged the reviewing court to apply the principle of equitable estoppel to avoid the Tax Commission's assessment of a tax claiming the tax amounted to a manifest injustice. This argument is similar to Petitioner's argument in the case at hand wherein it argues it should not have to pay the tax assessed because to do so would be unfair since Petitioner used good faith. The Court in Walker refused to apply the

equitable estoppel doctrine and noted:

> It appears that the dilemma which the plaintiff finds itself in arose for the most part from its lack of diligence in pursuing the dissolution procedures which are in fact controlled by statute. . . . The record does not indicate that the Commission misled the plaintiff in any manner nor does the record show that the plaintiff requested information which was withheld by the Commission.

Walker, 437 P.2d at 891. Similarly, Petitioner in the case at hand failed to ask all the questions in determining its tax responsibilities. The record does not indicate that the Commission misled the Petitioner in any manner since the tax issue in question was never discussed between the parties. Therefore, Petitioner is liable for the tax assessed.

Petitioner's position is also similar to that of the plaintiff in Matter of Estate of Rawlins v. Gardner, 588 P.2d 177 (Utah 1978). Rawlins involved an argument over the proper inheritance taxes to be assessed. The court noted:

> Plaintiff has made the fairly common mistake of taking one provision of law in isolation and assuming that it states all of the law on the subject, whereas the correct procedure is to consider all of the statutes bearing on the problem and, unless there is irreconcilable conflict, give them all effect if possible.

Rawlins, 588 P.2d at 179. Similarly, Petitioner in the case at hand made the mistake of assuming that two different sale transactions of water softeners would be taxed in the same way. A mistake in applying the tax laws does not relieve Petitioner of its tax liability.

IV. SUPERIOR IS BARRED FROM RAISING A DUE PROCESS CLAIM FOR THE FIRST TIME ON APPEAL AND SUPERIOR IS NOT ENTITLED TO ATTORNEY FEES BASED ON SUCH A CLAIM FOR THE SAME REASON.

Petitioner claims for the first time on appeal that its due process rights have been violated by Respondent's tax assessment. Petitioner failed to raise this constitutional claim before the Tax Commission and is now barred from raising it for the first time on appeal.[3] In Bangerter v. Poulton, 663 P.2d 100 (Utah 1983), the Supreme Court of Utah noted: "It is axiomatic that defenses and claims not raised by the parties in the trial court cannot be considered for the first time on appeal. Bangerter, 663 P.2d at 102 (citations omitted). In BJ-Titan Services v. State Tax Comm'n, 183 Utah Adv. Rep. 20 (Utah 1992), the petitioner tried to argue that a transfer of assets was not a "sale" because the purchaser owned the same assets before and after the transfer, and thus, there was no consideration for a sale to have taken place. BJ-Titan, 183 Utah Adv. Rep. at 26. The Court noted that "[b]ecause this argument was not presented to the Commission below, a finding of fact on consideration has not been made, and we will not indulge in such evidentiary

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[3] Petitioner states on page 12 of its Brief to the Court of Appeals that it has raised a due process claim on page 29 of the Record of this case and on pages 77 and 83 of the Transcript of Proceedings on October 29, 1991. However, a reading of these cited pages reveals that due process was not raised, nor was it raised at any other point in the proceedings of this case.

endeavors." BJ-Titan, 183 Utah Adv. Rep. 20, 27, n.7 (Utah 1992). Similarly, Petitioner did not raise its constitutional argument before the Tax Commission and therefore the issue is not properly before this Court on appeal. To hear Petitioner's due process argument now would require an examination of the terms and circumstances of the transaction at issue which involves an evidentiary endeavor the Court cannot undertake.

Additionally, Petitioner is not entitled to an award of attorney fees in this case under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988 (1981) (hereinafter "section 1988"), because Petitioner failed to raise a claim under 42 U.S.C.A. § 1983 (1979) (hereinafter "section 1983") in the previous proceedings before the Tax Commission. Section 1988 permits an award of attorney fees to the prevailing party in a proceeding brought under section 1983. Petitioner failed to raise a claim under section 1983 at the lower court level and is therefore barred from raising such a claim for the first time on appeal. Since Petitioner cannot raise a section 1983 claim, Petitioner cannot make a claim for attorney fees pursuant to section 1988, and must be denied attorney fees in this case.

A. If this Court finds Superior's due process claim properly before the Court, the Tax Commission argues that Superior's due process rights have not been violated because the Tax Commission followed established guidelines set forth by statute.

Respondent has not deprived Petitioner of property without due process. Petitioner claims that enforcement of the tax statutes in this case fails to give taxpayers sufficient notice of tax liability and therefore violates Petitioner's due process rights provided in the Utah Constitution, Article 1, Section 7 and the United States Constitution, Fourteenth Amendment. On the contrary, Respondent has merely assessed Petitioner's business according to established taxing statutes. Since the taxing scheme is set forth by statute, Petitioner is sufficiently notified of its tax liability.

In Walker Center Corp. v. State Tax Commission, 437 P.2d 888 (Utah 1968), the Plaintiff corporation sought review of a Tax Commission decision claiming the decision violated the due process clauses of both the Federal and State Constitutions. Specifically, the plaintiff claimed that the Tax Commission failed to announce, by regulation or otherwise, the Commission's policy and practice in granting tax clearances upon the filing of an undertaking, thus permitting year-end dissolution proceedings and avoidance of an additional year's corporate franchise tax. Walker, 437 P.2d at 890. Since Plaintiff was not notified that a

speedy tax clearance could have been obtained by the furnishing of an undertaking, it failed to obtain such an undertaking and was held subject to another year's corporate franchise tax. *Id.* at 890. The Court held that Plaintiff's due process rights were not violated by failure of the Tax Commission to notify Plaintiff of the Commission's tax clearance policy and practice. *Id.* at 890. The court noted that the record did not indicate that Plaintiff made any inquiry of the Commission as to such procedures. Nor did the record indicate that Plaintiff ever made a request for a tax clearance or that its request was denied by the Commission. *Id.* at 890. In conclusion, the court held that the burden of securing information about corporate dissolution and taxing procedures is up to the Plaintiff and failure of the Commission to notify a taxpayer of such procedures does not violate the taxpayer's due process rights. Walker, 437 P.2d at 890.

Similarly, in Chris & Dick's Lumber and Hardware v. Tax Comm'n, 791 P.2d 511 (Utah 1990), Plaintiff sought review of a final decision of the Tax Commission ordering Chris & Dick's to pay a ten percent penalty for the untimely filing of a prepayment sales tax return. Plaintiff argued that the language of the statute imposing the penalty was so vague as to violate the due process clause of the fourteenth amendment of the United States

Constitution. Chris & Dick's, 791 P.2d at 513. Specifically, Plaintiff argued that the nature of the fine to be imposed under the penalty statute was so uncertain that it did not express what conduct is prohibited. *Id.* at 516. The Court found that the standard to apply is that "[a] statute will be found unconstitutionally vague only when it is not sufficiently explicit and clear to inform the ordinary reader of common intelligence what conduct is proscribed." *Id.* at 511. The Court concluded that the statute was explicit and clear enough to prohibit conduct and thus rejected Plaintiff's due process claim. *Id.* at 516. The statutes in the case at hand clearly provide that retail sales of tangible personal property are subject to sales tax, and leases and rentals of tangible personal property are subject to use tax (Utah Code Ann. § 59-12-103(1)(a), (k) (1987)). They are clear enough that they do not violate Petitioner's due process rights in that the ordinary reader of common intelligence is informed of what is prescribed.

CONCLUSION

Petitioner is subject to sales tax on the sale of water softeners sold after installation and use of the water softener pursuant to a lease agreement. The sale of a water softener after such a lease arrangement is the sale of tangible personal

property which is attached to real property and is subject to sales tax pursuant to Utah Code Ann. § 59-12-103(1)(a) (1987) and Utah Admin. Rule 865-19-51S (1986). The sale price is not exempt from tax as installation charges because Petitioner has not proved that the sale price represents solely such installation charges, and because Petitioner failed to separately state such charges pursuant to Utah Admin. Rule 865-19-51S(E) (1986).

Respondent has not violated the Utah Administrative Rulemaking Act (hereinafter "UARA") because Respondent relied on established statutes and rules in assessing Petitioner's sale of water softeners. Pursuant to Utah Code Ann. § 63-46a-3 (1986), rulemaking is not required when a procedure or standard is already described in statute. Since the sales tax standard is already described by statute, Petitioner is on notice of the tax requirements, and no rule is required. Furthermore, Respondent has not "changed" its policy on the taxing of water softeners, but has merely applied the relevant taxing statutes to the situation at hand.

Petitioner should not be relieved of its tax liability for misinterpretation of the law. Mistake of law is no defense for failure to pay taxes even if made in good faith.

Petitioner's due process claim is not properly before this Court since Petitioner failed to raise such a claim before the

Tax Commission. Alternatively, Respondent has not violated Petitioner's due process rights because the taxing statutes are sufficiently clear as to what conduct is required. Additionally, Petitioner is not entitled to attorney fees in this case because Petitioner failed to raise a section 1983 claim before the Tax Commission. Petitioner is now barred from raising a section 1983 claim and is therefore not entitled to attorney fees under section 1988.

Wherefore, Respondent requests this Court to affirm the decision of the Tax Commission and hold Petitioner liable for the sales tax due on the sale of water softeners sold after installation and use of the water softeners pursuant to a lease agreement.

DATED this 1st day of July, 1992.

PAUL VAN DAM
Attorney General
by and through

Susan L. Barnum
Assistant Attorney General
Counsel for Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing BRIEF OF RESPONDENT to the following:

Delwin T. Pond
Lynn P. Heward
923 East 5350 South, #E
Salt Lake City, UT 84117

Utah State Tax Commission
Appeals Division
Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84134

Dated this 1st day of July, 1992.

Susan L. Barnum

APPENDIX A

59-12-103. Sales and use tax base — Rate.

(1) There is levied a tax on the purchaser for the amount paid or charged for the following:

(a) retail sales of tangible personal property made within the state;

(b) amount paid to common carriers or telephone or telegraph corporations as defined by § 54-2-1, whether the corporations are municipally or privately owned, for all transportation, telephone service, or telegraph service;

(c) gas, electricity, heat, coal, fuel oil, or other fuels sold or furnished for commercial cunsumption;

(d) gas, electricity, heat, coal, fuel oil, or other fuels sold or furnished for residential use;

(e) meals sold;

(f) admission to any place of amusement, entertainment, or recreation, including seats and tables reserved or otherwise, and other similar accommodations;

(g) services for repairs or renovations of tangible personal property or services to install tangible personal property in connection with other tangible personal property;

(h) cleaning or washing of tangible personal property;

(i) tourist home, hotel, motel, or trailer court accommodations and services for less than 30 consecutive days;

(j) laundry and dry cleaning services;

(k) leases and rentals of tangible personal property if the property situs is in this state, if the lessee took possession in this state, or if the property is stored, used, or otherwise consumed in this state; and

(l) tangible personal property stored, used, or consumed in this state.

(2) Except for Subsection (1)(d), the rates of the tax levied under Subsection (1) shall be:

(a) 5-3/32% through December 31, 1989; and

(b) 5% from and after January 1, 1990.

(3) The rates of the tax levied under Subsection (1)(d) shall be:

(a) 2-3/32% through December 31, 1989; and

(b) 2% from and after January 1, 1990.

History: L. 1933, ch. 63, § 4; 1933 (2nd S.S.), ch. 20, § 1; 1937, ch. 111, § 1; C. 1943, 80-15-4; L. 1943, ch. 93, § 1; 1959, ch. 113, § 1; 1961, ch. 148, § 1; 1963, ch. 140, § 1; 1965, ch. 126, § 1; 1965, ch. 127, § 1; 1969, ch. 187, § 2; 1969 (1st S.S.), ch. 14, § 2; 1973, ch. 153, § 1; 1975, ch. 179, § 1; 1977, ch. 220, § 1; 1983, ch. 258, § 4; 1983, ch. 270, § 1; 1983 (1st S.S.), ch. 6, § 1; 1984, ch. 56, § 1; 1985, ch. 172, § 2; 1986, ch. 37, § 2; 1986 (2nd S.S.), ch. 4, § 2; C. 1953, 59-15-4; renumbered by L. 1987, ch. 5, § 23; 1987, ch. 148, § 6; 1987, ch. 221, § 1.

Amendment Notes. — The 1983 amendment by Chapter 258, inserted provisions for a 1/6% increase in sales tax from July 1, 1983, through June 30, 1987; and added the final paragraph.

The 1983 amendment by Chapter 270 inserted the exemption on the sale of currency and coinage and on gold, silver, and platinum ingots, bars, medallions and coins in Subsection (a).

The 1983 (1st S.S.) amendment added 1/2% to the sales tax rates herein for the period beginning October 1, 1983, and ending September 30, 1984.

The 1984 amendment added 1/2% to the sales tax rates herein beginning October 1, 1984.

The 1985 amendment substituted "June 30, 1986, (ii) 4 35/64% from July 1, 1986, through December 31, 1989, and (iv) 4 1/2% from January 1, 1990" for "June 30, 1987 and (ii) 4 1/2% from July 1, 1987" in Subsection (a); substituted "June 30, 1986, 4 35/64% from July 1, 1986, through December 31, 1989, and 4 1/2% from January 1, 1990" for "June 30, 1987 and 4 1/2% from July 1, 1987" in Subsections (b)(1), (b)(2)

59-15-4. Sales tax — Rate — Disposition of revenue from temporary increase.

(1) There is levied and there shall be collected and paid

(a) A tax upon every retail sale of tangible personal property made within the state of Utah equivalent to the following rates (i) 4 5/8% from October 1, 1983, through June 30 1986 (ii) 4 38/64% from July 1 1986 through December 31, 1989, and (iii) 4 1/2% from January 1, 1990 and thereafter of the purchase price paid or charged except that where a person takes, as a trade in for part payment of the merchandise sold, tangible personal property other than money, that tax shall be computed and paid only upon the net difference between the selling price of the merchandise sold and the amount of the trade-in allowance For the purpose of this subsection, currency and coinage constituting legal tender of the United States or of a foreign nation, all sales of gold, silver, or platinum ingots, bars, medallions, or decorative coins, not constituting legal tender of any nation, with a gold, silver, or platinum content of not less than 80% shall not be considered tangible personal property The sale of coal, fuel oil, and other fuels shall not be subject to the tax except as hereinafter provided

(b) A tax equivalent to the following percentages of the amount paid

(i) 4 5/8% from October 1, 1983, through June 30, 1986, 4 38/64% from July 1, 1986, through December 31, 1989, and 4 1/2% from January 1, 1990, and thereafter of the amount paid to common carriers or telephone or telegraph corporations as defined by § 54-2-1, whether the corporations are municipally or privately owned, for all transportation, telephone service, or telegraph service, but the tax shall not apply to intrastate movements of freight and express or to street railway fares or to the sale of newspapers and newspaper subscriptions

(ii) 4 5/8% from October 1, 1983, through June 30, 1986, 4 38/64% from July 1, 1986, through December 31, 1989, and 4 1/2% from January 1, 1990, and thereafter of the amount paid to any person as defined in this act including municipal corporations for gas, electricity, heat, coal, fuel oil, or other fuels sold or furnished for commercial consumption For purposes of this Subsection (b), commercial consumption shall not include the amounts of these fuels sold or furnished to apartment houses or other similar buildings where persons maintain their places of residence but only to the extent these fuels are used for these places of residence

(iii) 1 5/8% from October 1, 1983, through June 30, 1986, 1 38/64% from July 1, 1986, through December 31, 1989, and 1 1/2% from January 1, 1990, and thereafter of the amount paid to any person as defined in this act, including municipal corporations, for gas, electricity, heat, coal, fuel oil, or other fuels sold or furnished for domestic or residential use, including use by persons residing in apartment houses or similar buildings

(c) A tax equivalent to the following rates 4 5/8% from October 1, 1983, through June 30, 1986, 4 38/64% from July 1, 1986, through December 31, 1989, and 4 1/2% from January 1, 1990, and thereafter of the amount paid for all meals furnished by any restaurant, eating house, hotel, drugstore, club, or other place

(d) A tax equivalent to the following rates 4 5/8% from October 1, 1983, through June 30, 1986, 4 38/64% from July 1, 1986, through December 31, 1989, and 4 1/2% from January 1, 1990, and thereafter of the amount paid for admission to any place of amusement, entertainment, or recreation

(e) A tax equivalent to the following rates: 4 5/8% from October 1, 1983, through June 30, 1986, 4 16/64% from July 1, 1986, through December 31, 1989, and 4 1/2% from January 1, 1990, and thereafter of the amount paid or charged for all services for repairs, renovations, cleaning, or washing of tangible personal property or for installation of tangible personal property rendered in connection with other tangible personal property.

(f) A tax equivalent to the following rates: 4 5/8% from October 1, 1983, through June 30, 1986, 4 38/64% from July 1, 1986, through December 31, 1989, and 4 1/2% from January 1, 1990, and thereafter of the amount paid or charged for tourist home, hotel, motel, or trailer court accommodations and services. This subsection shall not apply to the amount paid or charged for tourist home, motel, hotel, or trailer court where residency is maintained continuously under the terms of a lease or similar agreement for a period of not less than 30 days

(g) A tax equivalent to the following rates. 4 5/8% from October 1, 1983, through June 30, 1986, 4 46/64% from July 1, 1986, through December 31, 1989, and 4 1/2% from January 1, 1990, and thereafter of the amount paid or charged for laundry and dry cleaning services.

(h) A tax equivalent to the following rates 4 5/8% from October 1, 1983, through June 30, 1986, 4 48/64% from July 1, 1986, through December 31, 1989, and 4 1/2% from January 1, 1990, and thereafter of the amount paid or charged for leases and rentals of tangible personal property, when situs of the property is in this state, or if the lessee took possession in this state; provided, however, the tax need not be paid if the leased property is used exclusively in a foreign state

(2) The revenue collected from a 1/8% increase in sales tax from July 1, 1983, through June 30, 1986 and a 6/64% increase in sales tax from July 1, 1986 through December 31, 1989, shall be deposited in the General Fund.

UTAH CODE ANNOTATED

59-16-3. Use tax — Rate — Disposition of revenue from temporary increase.

(1) There is levied and imposed an excise tax on:

(a) The storage, use, or other consumption in this state of tangible personal property purchased at the rate of: (i) 4⅞% from October 1, 1983, through June 30, 1986, and (ii) 4⅜₆₄% from July 1, 1986, through December 31, 1989, and (iii) 4½% from January 1, 1990, and thereafter of the sales price of such property.

(b) The services for repairs or renovation of tangible personal property or for installation of tangible personal property rendered in connection with other tangible personal property at the rate of: (i) 4⅝% from October 1, 1983, through June 30, 1986, and (ii) 4⅜₆₄% from July 1, 1986, through December 31, 1989, and (iii) 4½% from January 1, 1990, and thereafter of the amount charged and paid for such services; if the retailer was called to this state, or if the property was sent to a retailer in another state, expressly for the purpose of performing such services.

(c) The lease or rental of tangible personal property stored, used, or otherwise consumed in this state at the rate of: (i) 4⅝% from October 1, 1983, through June 30, 1986, and (ii) 4⅜₆₄% from July 1, 1986, through December 31, 1989, and (iii) 4½% from January 1, 1990, and thereafter of the amount charged or paid for such rentals.

(2) Every person storing, using, or otherwise consuming in this state tangible personal property purchased, serviced, leased, or rented, shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this state.

(3) The revenue collected from a ⅛% increase in use tax from July 1, 1983, through June 30, 1986 and a ⁶⁄₆₄% increase in use tax from July 1, 1986 through December 31, 1989, shall be deposited in the General Fund.

TAX COMMISSION RULES

S51. Fabrication and installation labor in connection with retail sales of tangible personal property (Applies to sales and use taxes).

a. Sales tax applies to the sales of fabricated articles of tangible personal property. The amounts charged for fabrication and installation which is part of the process of creating the finished article must be included in the amount upon which tax is collected by sheet metal shops, iron works, boiler works, cabinet works, mill working plants and other similar business. This type of labor and service charge may not be deducted from the selling price used for taxation purposes even though billed separately to the consumer and regardless of whether or not the articles are commonly carried in stock or made up on special order.

b. Casting, forging, forming, cutting, drilling, heat treating, surfacing, machining, constructing and assembling are examples of operations which are steps in the processing or series of operations resulting in the creation or production of a finished article.

c. Charges for labor to install personal property in connection with other personal property are taxable (see regulation S78) whether material is furnished by seller or not. Labor to install tangible personal property to real property is exempt, whether the personal property becomes part of the realty or not. See regulation S58, dealing with repairs and improvements of real property, to determine applicable tax on personal property which becomes a part of real property. Tangible personal property which is attached to real property, but remains personal property, is subject to sales tax on the retail selling price of the personal property. The installation charges in such case are exempt if stated as a separate charge. If the retailer makes no segregation of selling price and installation charges, the sales tax applies to the entire contract price including installation charges.

d. This regulation is primarily to cover manufacturing and assembling labor. Other regulations deal with other types of labor and should be referred to whenever necessary.

Footnote: As amended eff. September 5, 1982 to revise third paragraph.

TAX COMMISSION RULES

S58. Materials and supplies sold to owners, contractors and repairmen of real property (Applies to sales and use taxes).

a. Tangible personal property sold to real property contractors and repairmen of real property is generally subject to tax. The person who converts the personal property into real property is considered to be the consumer of the personal property since he is the last one to own it as personal property. The contractor or repairman is deemed to be the consumer of tangible personal property used to improve, alter or repair real property regardless of the type of contract entered into, whether it is a lump sum, time and material or a cost-plus contract. The sale of real property is not subject to the tax nor is labor performed on real property subject to the tax. To give an example, the sale of a completed home or building is not subject to the tax, but the sale of materials and supplies to contractors and subcontractors are taxable transactions as sales to final consumers. This is true whether the contract is performed for an individual, a religious institution or governmental instrumentality. Sales of material to religious or charitable institutions and government agencies are exempt only if sold as tangible personal property and the seller is not required to install the material as an improvement to realty or use it to repair real property

b If the contractor or repairman purchases all materials and supplies from vendors who collect the Utah tax, no sales tax license is required unless he also makes direct sales of tangible personal property in addition to his work on real property. If direct sales are made, the contractor is required to obtain a sales tax license and must collect tax on all sales of tangible personal property to final consumers and must accrue and report tax on all merchandise bought tax-free and used in performing contracts to improve or repair real property. Books and records must be kept to account for both material sold and material consumed.

c. Sales of materials and supplies to contractors for use in out-of-state jobs are taxable unless sold in interstate commerce in accordance with regulation S44

d. This regulation does not apply to contracts whereby the retailer sells and installs personal property which does not become part of the real property. See regulations S51, S59, and S78 for information dealing with installation and repair of tangible personal property.

S78. Services of repair, renovation, and installation of tangible personal property (Applies to sales and use taxes).

a. Persons engaged in the business of washing, cleaning, repairing, or renovating tangible personal property, whether material is furnished by seller or not, are required to collect the sales tax upon the total charge made for the rendition of such services, together with the charge for tangible personal property, if any, sold in connection with such services

b. Amounts paid or charged for installing tangible personal property in connection with other tangible personal property are subject to tax. Installation of personal property to realty is not subject to tax as explained in regulations S51 and S58.

c. Charges made for cleaning and blocking hats are taxable under the provisions of the act imposing a tax on dry cleaning services.

d. Charges made for lubrication of motor vehicles are taxable as sales of tangible personal property unless the charge is separately itemized by the vendor for material and services.

e. Charges made for washing and cleaning motor vehicles and other tangible personal property made after July 1, 1969, are subject to the sales tax. Effective May 13, 1975, receipts from coin-operated car washes are exempt from sales tax.

f. Motor vehicles, trailers, contractors' equipment, drilling equipment, commercial equipment, railroad cars and engines, radio and television sets, watches, jewelry, clothing and accessories, shoes, tires and tubes, office equipment, furniture, bicycles, sporting equipment, boats and household appliances not permanently attached to a house or building are a few examples of tangible personal property upon which the sales or use tax applies when repaired, washed, cleaned, renovated, or installed in connection with other tangible personal property.

g. Property, trade fixtures or equipment which is attached to real property or improvements to real property, in a permanent or semipermanent manner, shall be considered as real property while so attached. Such property, trade fixtures or equipment, if removed from the premises for the purpose of repairs, shall be considered as tangible personal property to which the tax shall apply.

h. Amounts paid or charged for services upon the person of an individual, such as physicians' or barbers' services, are not taxable. Amounts paid or charged for repairing, building or renovating of real property, as such, are not taxable, except as explained in regulation No S58.

i. Laundry and dry cleaning services obtained through self-service, coin-operated laundry and dry cleaning machines are exempt from sales tax.

Footnote: As amended, eff September 5, 1982. Recent history: 1973, added exemption for coin-operated laundry and dry-cleaning sales; 1975, added exemption for coin-operated car wash sales; 1982, added reference in first paragraph to material furnished by seller and generally revised format

CHAPTER 46a

ADMINISTRATIVE RULEMAKING ACT

63-46a-1. Short title.

This act is known as the "Utah Administrative Rulemaking Act."

History: C. 1953, 63-46a-1, enacted by L. 1985, ch. 158, § 1.

Meaning of "this act". — The term "this act," referred to in this section, means Laws 1985, ch. 158, §§ 1 and 2 which is codified as §§ 63-46a-1 to 63-46a-15.

COLLATERAL REFERENCES

Utah Law Reviews. — Recent Developments in Utah Law, 1980 Utah L. Rev. 649.

Am. Jur. 2d. — 1 Am. Jur. 2d Administrative Law §§ 92 to 137; 2 Am. Jur. 2d Administrative Law §§ 277 to 314.

C.J.S. — 73 C.J.S. Public Administrative Law and Procedure §§ 87 to 102.

Key Numbers. — Administrative Law and Procedure ⇐ 381 to 427.

63-46a-2. Definitions.

As used in this chapter:

(1) "Agency" means each state board, commission, institution, department, division, officer, or other state government entity other than the Legislature, its committees, the political subdivisions of the state, or the courts, which is authorized or required by law to make rules, adjudicate, grant or withhold licenses, grant or withhold relief from legal obligations, or perform other similar actions or duties delegated by law.

(2) "Bulletin" means the Utah State Bulletin.

(3) "Effective" means operative and enforceable.

(4) (a) "File" means to submit a document to the office as prescribed by this chapter.

(b) "Filing date" means the day and time the document is recorded as received by the office.

(5) "Office" means the Office of Administrative Rules, which is under the supervision of the Department of Administrative Services.

(6) "Person" means any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency.

(7) "Publication" means making a rule available to the public by printing the rule or a summary of the rule in the bulletin. "Publication date" means the inscribed date of the bulletin.

(8) (a) "Rule" means a statement made by an agency that applies to a general class of persons, rather than specific persons and: (i) implements or interprets policy made by statute; or (ii) prescribes the policy of the agency in the absence of express statutory policy; or (iii) prescribes the administration of the agency's functions or describes its organization, procedures, and operations. "Rule" includes the amendment or repeal of an existing rule.

(b) "Rule" does not include: (i) statements concerning only the internal management of an agency and which do not affect private persons as a class, other agencies, or other governmental entities; (ii) declaratory rulings pursuant to § 63-46a-14; or (iii) executive orders.

History: C. 1953, 63-46a-2, enacted by L. 1985, ch. 158, § 1.

63-46a-3. When rulemaking is required.

(1) Each agency shall maintain a complete copy of its current rules and make it available to the public for inspection during its regular business hours.

(2) Each agency shall make rules to fulfill the purposes of this chapter.

(3) Rulemaking is required when:

(a) agency actions affect a class of persons;

(b) agency actions affect the operations of another agency; or

(c) statutory or federal mandate requires rules.

(4) Rulemaking is not required when:

(a) a procedure or standard is already described in statute;

(b) agency action affects an individual person, not a class of persons;

(c) agency action applies only to internal agency procedures; or

(d) grammatical or other insignificant rule changes do not affect agency policy or the application or results of agency actions.

(5) Each agency may incorporate by reference applicable federal and professionally recognized uniform code rules, if the agency:

(a) incorporates by reference federal and uniform rules, and all future changes in them, under the procedures of this chapter;

(b) states specifically in its rules which federal and uniform rules are incorporated by reference, and any agency deviation from them; and

(c) maintains complete and current copies of federal and uniform rules incorporated by reference, both at the agency and at the Office of Administrative Rules, available for public inspection.

(6) The state attorney general shall provide agencies any assistance to ensure agency rules are legally sound.

History: C. 1953, 63-46a-3, enacted by L. 1985, ch. 158, § 1.

63-46a-4. Rulemaking procedure.

(1) When making, amending, or repealing a rule, agencies shall comply with this section, consistent procedures required by other statutes, applicable federal mandates, and rules made by the office to implement this chapter, except as provided in §§ 63-46a-6 and 63-46a-7.

(2) Each agency shall file its proposed rule and rule analysis form with the office. Rule amendments shall be marked, with new language underlined and deleted language interlined. The form and proposed rule, unless the rule is too long as determined by the office, shall be published in the next issue of the bulletin.

(3) The rule analysis form shall contain:

(a) a summary of the rule or change;

(b) the purpose of the rule or reason for the change;

(c) the statutory authority or federal requirement for the rule;

(d) the anticipated cost or savings to the state budget and compliance cost for affected persons;

(e) how interested persons may inspect the full text of the rule;
(f) how interested persons may present their views on the rule;
(g) the time and place of any scheduled public hearing;
(h) the name and telephone number of an agency employee who may be contacted about the rule; and
(i) the signature of the agency head or designee.

(4) A copy of the rule analysis form shall be mailed to all persons who have made timely request of the agency for advance notice of its rulemaking proceedings, and to any other person who, by statutory or federal mandate, or in the judgment of the agency, should also receive notice.

(5) Following the publication date, the agency shall allow at least 30 days for public comment on the rule. During the public comment period the agency may hold a hearing on the rule.

(6) Except as provided in §§ 63-46a-6 and 63-46a-7, a proposed rule becomes effective on any date specified by the agency which is no fewer than 30 nor more than 90 days after the publication date. The agency shall provide written notification of the rule's effective date to the office. Notice of the effective date shall be published in the next issue of the bulletin.

History: C. 1953, 63-46a-4, enacted by L. 1985, ch. 158, § 1.

COLLATERAL REFERENCES

Am. Jur. 2d. — 2 Am. Jur 2d Administrative Law §§ 279 to 285.
C.J.S. — 73 C.J.S. Public Administrative Law and Procedure §§ 103, 108.
Key Numbers. — Administrative Law and Procedure ⇐ 392 to 402

63-46a-5. Public hearings.

(1) Each agency shall hold a public hearing on a proposed rule if:
(a) required by state or federal mandate;
(b) (i) another state agency, ten interested persons, or an interested association having not fewer than ten members request a hearing; and
(ii) the agency receives the request in writing not more than 15 days after the publication date of the proposed rule.

(2) The requested hearing shall be held within 30 days of receipt of the request.

History: C. 1953, 63-46a-5, enacted by L. 1985, ch. 158, § 1.

63-46a-6. Changes in rules.

(1) If an agency changes a proposed rule already published in the bulletin, the procedures of this section apply to the change unless:
(a) the change is grammatical or does not affect agency policy or the application or results of agency actions, in which case the agency need only notify the office of the change; or
(b) the rule is already effective, in which case the agency shall amend the rule under § 63-46a-4.

(2) To change a proposed rule, the agency shall file a copy of the changed rule and a rule analysis form reflecting the change with the office, which shall publish the form in the bulletin.

(3) The changed proposed rule becomes effective 30 days after its publication date.

History: C. 1953, 63-46a-6, enacted by L. 1985, ch. 158, § 1.

63-46a-7. Exceptions to rulemaking procedure.

(1) All agencies shall comply with the rulemaking procedures of § 63-46a-4 unless an agency finds that these procedures would:

(a) cause an imminent peril to the public health, safety, or welfare;

(b) cause an imminent budget reduction because of budget restraints or federal requirements; or

(c) place the agency in violation of federal or state law.

(2) When finding its rule excepted under this section from regular rulemaking procedures, the agency shall file a copy of the rule and a rule analysis form, including the specific reasons and justifications for its findings, with the office. The rule shall be published in the bulletin as provided in Subsection 63-46a-4(2). The agency shall also notify interested parties as provided in Subsection 63-46a-4(4). The rule becomes effective for a period not exceeding 120 days on the date of filing or any later designated date.

(3) If the agency intends the rule to be effective beyond 120 days, the agency shall also comply with the procedures of § 63-46a-4.

History: C. 1953, 63-46a-7, enacted by L. 1985, ch. 158, § 1.

63-46a-8. Synopsis of rulemaking to interim committee.

(1) Each agency shall yearly provide to the members of the appropriate legislative interim committee, as determined by the Legislative Management Committee, a brief synopsis of all rulemaking activity by the agency during the past year; action taken to comply with federal law shall be so designated.

(2) The synopsis shall be sent to the committee members so that it arrives at least one week prior to the committee's October meeting date.

(3) The report shall encompass all of the agency's rulemaking activity as described in Subsection (1) from September 15 of the previous year to September 15 of the year the synopsis is distributed under Subsection (2).

History: C. 1953, 63-46a-8, enacted by L. 1985, ch. 158, § 1.

63-46a-9. Agency review of rules.

Each agency shall review all rules within five years of the rule's effective date and then at five-year intervals, except that rules effective prior to 1983 need not be reviewed until 1988. At the conclusion of the review, the agency shall continue, amend, or repeal the rule. If the agency amends or repeals the rule, it shall comply with the rulemaking procedures of this chapter. If the agency continues the rule, it shall file with the office a notice of continuation and a statement citing a supporting reason for continuation, which shall be published in the bulletin. The supporting reason shall include:

(1) a concise statement of the particular statutory provisions under which the rule is enacted and how these provisions authorize or require the rule;

(2) a summary of written comments received after enactment of the rule from interested persons supporting or opposing the rule; and

(3) a reasoned justification for continuation of the rule, including reasons why the agency disagrees with comments in opposition to the rule, if any.

History: C. 1953, 63-46a-9, enacted by L. 1985, ch. 158, § 1.

63-46a-10. Office of Administrative Rules.

The Office of Administrative Rules shall:

(1) establish all filing, publication, and hearing procedures necessary to make rules under this chapter;

(2) record in a log the receipt of all agency rules, rule analysis forms, and notices of effective dates;

(3) make the log, copies of all proposed rules and rulemaking documents available for public inspection;

(4) publish at least monthly all proposed rules, rule analysis forms, notices of effective dates, and continuation notices in the bulletin, except that the complete text of any proposed rule excessive in length or which is expensive to publish, as determined by the office, may be included by reference;

(5) compile, codify, and index all effective rules in an administrative code which shall be the reference source of all state administrative rules, and periodically publish this code and supplements or revisions;

(6) publish at least monthly a digest summarizing all rules and notices printed in the most recent bulletin;

(7) print, or contract to print, all rulemaking publications the office determines necessary to implement this chapter;

(8) distribute without charge copies of the bulletin and administrative code to state-designated repositories and the two houses of the Legislature, and distribute without charge copies of the digest to state legislators, agencies, and political subdivisions on request;

(9) distribute, at prices covering all costs, all rulemaking publications to requesting persons and agencies, except as provided in Subsection (8);

(10) provide agencies assistance in rulemaking; and

(11) administer this chapter and require state agencies to comply with filing, publication, and hearing procedures.

History: C. 1953, 63-46a-10, enacted by L. 1985, ch. 158, § 1.

63-46a-11. Legislative Review Committee.

(1) There is created a Legislative Review Committee of six members, no more than four of whom may be of the same political party, which shall be designated the Rules Review Committee. The committee shall be composed of three members of the Senate to be appointed by the president of the Senate and three members of the House to be appointed by the speaker of the House. No more than two senators and two representatives may be of the same political party. Members shall serve for two-year terms, and until their successors are appointed. Vacancies on the committee shall be filled by the appointing authority for the remainder of the term. A vacancy exists whenever a committee member ceases to be a member of the Legislature.

(2) Each agency rule as defined in Subsection 63-46a-2(8) shall be submitted to the committee at the same time public notice is given under Subsection 63-46a-4(2).

(3) The committee shall exercise continuous oversight of the process of rulemaking and examine rules as submitted by each agency with respect to (i) statutory authority; (ii) compliance with legislative intent; (iii) impact on the economy and on the government operations of the state and local political subdivisions; and (iv) impact on affected persons. To carry out these duties, it may examine other issues it deems appropriate. The committee shall follow generally accepted principles of statutory construction.

(4) The committee may request a fiscal note regarding any rule, from the legislative fiscal analyst.

(5) The committee may prepare written findings of its review of each rule following the committee review of the rule and include any recommendations, including legislative action. The committee shall send a copy of any findings to the state agency concerned, with a request that the agency notify the committee of any changes in the rule reviewed pursuant to the recommendations, and if a copy of the findings was requested by a member of the Legislature or by a person affected by the rule, to the person requesting the copy. The committee shall also send a copy of the findings to the presiding officers of both the House and the Senate, who shall refer the determinations to any legislative committee concerned.

(6) The committee shall submit a report on the review of state agency rules by the committee to each member of the Legislature at each regular session. The report shall include:

(a) the findings and recommendations made by the committee under Subsection (5);

(b) any action taken by an agency in response to committee recommendations; and

(c) any recommendations by the committee for legislation.

History: C. 1953, 63-46a-11, enacted by L. 1985, ch. 158, § 1.

63-46a-12. Interested parties.

An interested person may petition an agency requesting the making, amendment, or repeal of a rule. The office shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. A statement shall accompany the proposed rule, or amendment or repeal of a rule, demonstrating that the proposed action is within the jurisdiction of the agency and appropriate to the powers of the agency. Within 30 days after submission of a petition, the agency shall either deny the petition in writing stating its reasons for the denial or initiate rulemaking proceedings in accordance with § 63-46a-4.

History: C. 1953, 63-46a-12, enacted by L. 1985, ch. 158, § 1.

63-46a-13. Declaratory judgment to determine validity of rule.

(1) The validity or applicability of a rule may be determined in an action for declaratory judgment in any district court of this state with appropriate venue, if it is alleged that the rule, or its potential application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff.

(2) In an action for declaratory judgment on a rule, the agency shall be made a party to the action.

(3) A declaratory judgment by a court may be rendered whether or not the plaintiff has requested the agency to pass upon the applicability of the rule in question. However, the issue of applicability may not be determined by the district court while the issue is under consideration by the agency during any proceeding pending before that agency or during the time the agency's decision concerning applicability is subject to appeal or being considered on appeal.

History: C. 1953, 63-46a-13, enacted by L. 1985, ch. 158, § 1.

Cross-References. — Archives and records service, rights of individuals on whom data stored, data in dispute, procedure, § 63-2-85.4.

63-46a-14. Contesting a rule.

A proceeding to contest any rule on the ground of noncompliance with the procedural requirements of this chapter shall commence within two years of the effective date of the rule.

History: C. 1953, 63-46a-14, enacted by L. 1985, ch. 158, § 1.

63-46a-15. Declaratory ruling by agency.

Each agency shall provide by rule for the filing and prompt disposition by the agency of petitions for declaratory rulings as to the applicability of any statutory provision, rule, or order of the agency. Agency rulings disposing of petitions have the same status as agency decisions in cases disposed of by the agency after hearing.

History: C. 1953, 63-46a-15, enacted by L. 1985, ch. 158, § 1.

(iv) the governor's executive orders or proclamations;

(v) opinions issued by the attorney general's office;

(vi) declaratory rulings issued by the agency according to the provisions of Section 63-46b-21 except as required by Section 63-46a-3; or

(vii) rulings by an agency in adjudicative proceedings, except as required by Subsection 63-46a-3(6).

(14) "Rule Analysis Form" means the form created by the division to summarize and analyze rules.

(15) "Substantive change" means a change in a rule that affects the application or results of agency actions.

History: C. 1953, 63-46a-2, enacted by L. 1985, ch. 158, § 1; 1987, ch. 241, § 1; 1988, ch. 72, § 13.

Amendment Notes. — The 1987 amendment so rewrote the section as to make a detailed analysis impracticable.

The 1988 amendment, effective April 25, 1988, substituted "Section 63-46b-21" for "Section 63-46a-15" in Subsection (13)(c)(vi) and made two minor stylistic changes.

63-46a-3. When rulemaking is required.

(1) Each agency shall:

(a) maintain a complete copy of its current rules; and

(b) make it available to the public for inspection during its regular business hours.

(2) In addition to other rulemaking required by law, each agency shall make rules when agency action:

(a) authorizes, requires, or prohibits an action;

(b) provides or prohibits a material benefit;

(c) applies to a class of persons or another agency; and

(d) is explicitly or implicitly authorized by statute.

(3) Rulemaking is also required when an agency issues a written interpretation of a state or federal legal mandate.

(4) Rulemaking is not required when:

(a) agency action applies only to internal agency management, inmates or residents of a state correctional, diagnostic, or detention facility, persons under state legal custody, patients admitted to a state hospital, members of the state retirement system, or students enrolled in a state education institution;

(b) a standardized agency manual applies only to internal fiscal or administrative details of governmental entities supervised under statute;

(c) an agency issues policy or other statements that are advisory, informative, or descriptive, and do not conform to the requirements of Subsections (2) and (3); or

(d) an agency makes nonsubstantive changes in a rule, except that the agency shall file all nonsubstantive changes in a rule with the division.

(5) A rule shall enumerate any penalty authorized by statute that may result from its violation.

(6) Each agency shall enact rules incorporating the principles of law not already in its rules that are established by final adjudicative decisions within 120 days after the decision is announced in its cases.

(7) (a) Each agency may enact a rule that incorporates by reference:

(i) all or any part of another code, rule, or regulation that has been adopted by a federal agency, an agency or political subdivision of this state, an agency of another state, or by a nationally-recognized organization or association;

(ii) lists, tables, illustrations, or similar materials that are subject to frequent change, fully described in the rule, and are available for public inspection; or

(iii) lists, tables, illustrations, or similar materials that the director determines are too expensive to reproduce in the administrative code.

(b) Rules incorporating materials by reference shall:

(i) be enacted according to the procedures outlined in this chapter;

(ii) state that the referenced material is incorporated by reference; and

(iii) define specifically what material is incorporated by reference and identify any agency deviations from it.

(c) The agency shall identify any substantive changes in the material incorporated by reference by following the rulemaking procedures of this chapter.

(d) The agency shall maintain a complete and current copy of the referenced material available for public inspection at the agency and at the division.

(8) (a) This chapter is not intended to inhibit the exercise of agency discretion within the limits prescribed by statute or agency rule.

(b) An agency may enact a rule creating a justified exception to a rule.

(9) An agency may obtain assistance from the attorney general to ensure that its rules meet legal and constitutional requirements.

History: C. 1953, 63-46a-3, enacted by L. 1985, ch. 158, § 1; 1987, ch. 241, § 2; 1988, ch. 72, § 14.

Amendment Notes. — The 1987 amendment so rewrote the section as to make a detailed analysis impracticable.

The 1988 amendment, effective April 25, 1988, in Subsection (6) inserted "not already in its rules that are," substituted "120" for "90," and added "in its cases."

63-46a-4. Rulemaking procedure.

(1) Except as provided in Sections 63-46a-6 and 63-46a-7, when making, amending, or repealing a rule, agencies shall comply:

(a) with the requirements of this section;

(b) with consistent procedures required by other statutes;

(c) with applicable federal mandates; and

(d) with rules made by the division to implement this chapter.

(2) (a) Each agency shall file its proposed rule and rule analysis form with the division.

(b) Rule amendments shall be marked, with new language underlined and deleted language interlined.

(c) (i) The division shall publish the rule analysis form and the text of the proposed rule in the next issue of the bulletin, unless the director determines that the text of the rule is too long.

(ii) If the director determines that the rule is too long to publish, the director shall publish the rule analysis form and shall publish the rule by reference to a copy on file with the division.

(3) The rule analysis form shall contain:
(a) a summary of the rule or change;
(b) the purpose of the rule or reason for the change;
(c) the statutory authority or federal requirement for the rule;
(d) the anticipated cost or savings to:
(i) the state budget;
(ii) local governments; and
(iii) individuals;
(e) the compliance cost for affected persons;
(f) how interested persons may inspect the full text of the rule;
(g) how interested persons may present their views on the rule;
(h) the time and place of any scheduled public hearing;
(i) the name and telephone number of an agency employee who may be contacted about the rule; and
(j) the name of the agency head or designee who authorized the rule.

(4) A copy of the rule analysis form shall be mailed to all persons who have made timely request of the agency for advance notice of its rulemaking proceedings, and to any other person who, by statutory or federal mandate, or in the judgment of the agency, should also receive notice.

(5) Following the publication date, the agency shall allow at least 30 days for public comment on the rule.

(6) (a) Except as provided in Sections 63-46a-6 and 63-46a-7, a proposed rule becomes effective on any date specified by the agency that is no fewer than 30 nor more than 90 days after the publication date.

(b) The agency shall provide written notice of the rule's effective date to the division.

(c) The division shall publish notice of the effective date of the rule in the next issue of the bulletin.

History: C. 1953, 63-46a-4, enacted by L. 1985, ch. 158, § 1; 1987, ch. 241, § 3.

Amendment Notes. — The 1987 amendment so rewrote the section as to make a detailed analysis impracticable.

NOTES TO DECISIONS

ANALYSIS

Agency rules
—Validity
Cited

Agency rules.

—Validity.

The rules of an administrative agency are not valid unless the agency complies with the rulemaking procedures prescribed in this chapter Lane v Board of Review, 727 P 2d 206 (Utah 1986)

Cited in Williams v Public Serv Comm'n, 754 P 2d 41 (Utah 1988)

COLLATERAL REFERENCES

Am. Jur. 2d. — 2 Am Jur 2d Administrative Law §§ 279 to 285

C.J.S. — 73 C J S Public Administrative Law and Procedure §§ 103, 108.

Key Numbers. — Administrative Law and Procedure ⇨ 392 to 402

CONSTITUTION OF UTAH

ARTICLE I

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

History: Const. 1896.

Cross-References. — Eminent domain generally, § 78-34-1 et seq.

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT XIV

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R. S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

This section was based upon Act Apr. 20, 1871, ch 22, § 1, 17 Stat. 13.

This section formerly appeared as 8 U.S.C. § 43.

Amendments:

1979. Act Dec. 29, 1979 inserted "or the District of Columbia" and "For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.".

Other provisions:

Application of 1979 amendments. Act Dec. 29, 1979, P. L. 96-170, § 3, 93 Stat. 1284, which appears as 28 USCS § 1343 note, provided that the amendments made to this section by such Act are applicable with respect to any deprivation of rights, provileges, or immunities secured by the Constitution and laws occurring after enactment on Dec. 29, 1979.

CROSS REFERENCES

Privileges and immunities, USCS, Constitution, Art. 4, § 2 and Amend. 14, § 1.

Citizenship, USCS Constitution, Amend. 14, § 1.

Offenses against civil rights of citizens, 18 USCS §§ 241–246.

Jurisdiction of district courts, 28 USCS § 1343.

This section is referred to in 42 USCS §§ 1988, 1997E.

RESEARCH GUIDE

Federal Procedure L Ed:

Civil Rights, Fed Proc, L Ed, §§ 11:6, 8, 11, 16, 18, 21, 26, 45, 50, 59, 60, 63, 75, 84, 85, 88, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155,

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981–1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(R. S. § 722; Oct. 19, 1976, P. L. 94-559, § 2, 90 Stat. 2641; Oct. 21, 1980, P. L. 96-481, Title II, § 205(c), 94 Stat. 2330.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' " referred to in this section, comprised R. S. §§ 530–1093, 1977–1991, and 5323–5550, all of which have been repealed except those appearing as 42 USCS §§ 1981–1983, 1985–1992, 1994 30 USCS, and note prec. 28 USCS § 1781, § 53, and 44 USCS §§ 325, 326. Former repealed sections which pertained to the judiciary and crimes are generally covered by Titles 18 and 28.

Explanatory notes:

This section was based upon Act Apr. 9, 1866, ch 31, § 3, 14 Stat. 27; May 31, 1870, ch 114, § 18, 16 Stat. 144. This section was formerly classified to section 729 of Title 28 prior to the general revision and enactment of Title 28, Judiciary and Judicial Procedure, by act June 25, 1948, ch 646, § 1, 62 Stat. 869.

The words "district courts" have been substituted for "district and circuit courts" in this section on the authority of Act Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167, which provided that references in statutes of the United States to the circuit courts of the United States shall be deemed to be references to the district courts.

Amendments:

1976. Act Oct 19, 1976, added "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.".

1980. Act Oct. 21, 1980 (effective 10/1/81, as provided by § 208 of such Act), deleted "or in any civil action or proceeding by or on behalf